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MAY 4 1981
ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

NO. 80-1866

ALICE LeMASTER,

Petitioner

versus

JAMES R. McGONIGLE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

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(a) QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE TELEVISING OF THE CBS DOCUMENTARY, "SEE YOU IN COURT", ON JULY 9, 1980 (THE EVE OF THE JURY DELIBERATIONS), WHICH CRITICIZED PERSONS SEEKING COMPENSATION FOR PERSONAL INJURIES IRRESPECTIVE OF THE FAULT OF THE TORTFEASOR CONSTITUTED INHERENTLY PREJUDICIAL PUBLICITY DENYING PLAINTIFF HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE EVEN DEFENDANT'S COUNSEL CONCEDED TO THE TRIAL COURT THAT THERE WAS NO EVIDENCE DISPUTING PLAINTIFF'S RIGHT TO A VERDICT?

(b) LIST OF PARTIES

Plaintiff:

Alice LeMaster, represented by Richard J. Orloski, of Stamberg, Caplan & Calnan

Defendant:

James R. McGonigle, represented by Richard Santee of Sigmon & Ross

(c) TABLE OF AUTHORITIES

Brasville v. U.S. 200 F.2d 597 (5th Cir, 1952)..... 18

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(d) OFFICIAL AND UNOFFICIAL REPORTS

None.

(e) STATEMENT OF JURISDICTION

The final judgment of the United States Court Of Appeals, Third Circuit, was rendered and then entered on March 5, 1981, and the Petition For Writ of Certiorari is timely filed within sixty (60) days thereof. The jurisdiction of this Court rests upon Rule 20 of the Rules of the Supreme Court, and 28 U.S.C. §2101.

(f) CONSTITUTIONAL AND STATUTORY PROVISIONS

"No person shall...be deprived of life, liberty or property, without due process of law.....

Amendment V of the United States Constitution.

"...the right of trial by jury shall be preserved..."

Amendment VII of the United States Constitution.

(g) STATEMENT OF THE CASE

On May 3, 1979, at approximately 6:00 P.M., Plaintiff left her place of employment at Holiday Inn West, Routes 22 and 309 in Allentown, and drove to her home in Emmaus, Pennsylvania [N.T.,1,8, 11]. Plaintiff drove her own automobile south on Route 309 and then exited south on Cedar Crest Boulevard. [N.T.,1,11]. Cedar Crest Boulevard is a two-lane highway, north and south, with one lane in each direction. [N.T.,1,11]. As Plaintiff approached the intersection of Cedar Crest Boulevard and Lehigh Country Club Road, the vehicle in front of her, driven by Pearl Hershey, stopped in order to make a left-hand turn across the northbound lane of Cedar Crest Boulevard.[N.T.,1,13,14].

There was a light drizzle as Plaintiff approached the intersection, and

both Plaintiff's vehicle and the Hershey automobile had their lights turned on. [N.T.,1,13]. The Plaintiff had np difficulty in bringing her automobile to a complete stop behind the Hershey vehicle. [N.T.,1,14]. As Plaintiff was lawfully stopped behind the Hershey vehicle, an automobile driven by Defendant, also proceeding south on Cedar Crest Boulevard, struck her in the rear. [N.T.,1,17].

Photographs of the intersection at intervals of 30 feet apart were admitted into evidence. [N.T.,1,18, Exhibits 1-23]. The photographs indicate a line of vision of 750 feet northward from the intersection of Cedar Crest Boulevard and Lehigh Country Club Road. [N.T.,1,19,20]. In other words, the Defendant could see the

Plaintiff's vehicle lawfully stopped on the highway with its lights on about 750 feet before the impact. [N.T.,1,20,21].

After impact from the rear, the front of Plaintiff's vehicle struck the rear of the Hershey vehicle. [N.T.,1,21]. Photographs of the rear-end damage of Plaintiff's vehicle were admitted into evidence. [N.T.,1,22; Exhibits 24-31].

The Defendant failed to take the stand, and offered only one witness, Dr. Eugene DiSalvo, solely on the issue of damages. [N.T., II, 143-178]. When Plaintiff moved for a directed verdict on the issue of liability, Defendant candidly admitted to the Court that there was no evidence contesting liability:

> "THE COURT: Mr. Santee, did you present any evidence to contest liability?
> MR. SANTEE: No, there was none."
> [N.T.,II, 216]

After the jury verdict, Plaintiff's counsel, on July 14, 1980, viewed for the first time on a videotape cassette the CBS Documentary, "See You In Court", which was televast on July 9, 1980 at 10:00 P.M. the night before the case was submitted to the jury. The Affidavit submitted in support of Plaintiff's post-trial motions notes as follows:

> "3. On Wednesday, July 9, 1980, CBS carried a nationally televised program entitled 'See You In Court' at 10:00 P.M.
>
> "4. The program was broadcast on the following channels which are carried in the Eastern District Of Pennsylvania: 2 (WCBS-New York City); 10 (WCAU-Philadelphia); 15 (WLYH-Lancaster-Lebanon); 21 (WHP-Harrisburg); 22 (WDAU-Scranton/Wilkes-Barre); and 43 (WSBA-York).

* * *

"6. The timing of the program was such that it was telecast after testimony was closed and immediately prior to the closing arguments of counsel and the charge to the jury by the Court.

"7. On Monday, July 14, 1980, at approximately 6:00 P.M., counsel for Plaintiff saw the aforementioned telecast for the first time on a VCR videotape which revealed the following contents of said program:
A) The introduction criticized people for suing;
B) The program prominently featured a country and western song with the lyrics '...lawyers are leeches...'
C) The program blamed the litigation explosion on the number of students graduating from law school making'...more hungry lawyers looking for business;
D) The program claimed that lawyers see to it that there are more laws and more lawsuits;
E) The program portrayed defendants as being '...caught up in a maze of lawyers...';

F) The central thesis of the program was that the costs of litigation is borne by the American people who lose when the jury returns a verdict for the plaintiff;
G) The program specifically criticized the case of U.S. v. IBM calling it an 11 year ordeal whose major accomplishment was to provide for a very comfortable living for hundreds of lawyers;
H) The program returned to the country and western song with the lyrics '...lawyers are takers; they are pocket book breakers...';
I) The program again criticized a jury verdict against the Town of Cashion which had to borrow money from a bank to pay off a jury verdict because the town did not have liability insurance;
J) The program then criticized a million dollar verdict against the City of Beverly Hills, and indicated that this induces claims against the municipality as a '...deep pocket...' at a rate of one claim a day;
K) The program prominently featured the claim that if

a person is placed in an unfortunate situation of being injured by someone, then you should bear the responsibility of your injury yourself rather than seeking compensation from the tortfeasor;
L) The program claimed that taxes go up because municipal corporations must pay higher and higher insurance premiums;
M) The program also criticized the usage of contingency fees by lawyers for the Plaintiff and labelled the private lawyer as a hired gun for the Plaintiff;
N) The program advised that even if a Defendant is innocent, the costs of the litigation can bankrupt him;
O) The program concluded on the note that even if a private citizen never finds himself in court, the existence of litigation--and verdicts in favor of plaintiffs--will adversely affect all of our lives."

Defendant failed to contest these facts by way of counter-affidavits. The videotape of the program has been filed of record. See, Order of July 21, 1980

accepting a videotape of said broadcast as part of the record. The trial court agreed with the Plaintiff's characterization of the videotape as reflecting a bias against plaintiffs in that it depicted the "horrors" of litigation for defendants, but indicated that, in absence of proof of actual prejudice to the Plaintiff, a new trial would not be granted.

The trial court further found that, even though liability was clear, the jury could still find as a fact that Plaintiff failed to meet her burden of proof. Order of August 29, 1980. The United States Court of Appeals affirmed this Order, per curiam, on March 5, 1980. The matter is now before this Court on the Petition For Writ of Certiorari.

(h) STATEMENT OF ORIGINAL FEDERAL JURISDICTION

Jurisdiction of this Court before the United States District Court was under diversity of citizenship under 28 U.S.C. §1332, in that the Plaintiff was a citizen of Ohio, and Defendant was a citizen of Pennsylvania, and the amount in controversy was in excess of $10,000.00 exclusive of interest.

(i) ARGUMENT

I. WHETHER OR NOT THE TELEVISING OF THE CBS DOCUMENTARY, "SEE YOU IN COURT" ON JULY 9, 1980 (THE EVE OF THE JURY DELIBERATIONS) WHICH CRITICIZED PERSONS SEEKING COMPENSATION FOR PERSONAL INJURIES IRRESPECTIVE OF THE FAULT OF THE TORTFEASOR CONSTITUTED INHERENTLY PREJUDICIAL PUBLICITY DENYING PLAINTIFF HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHERE EVEN DEFENDANT'S COUNSEL CONCEDED TO THE TRIAL COURT THAT THERE WAS NO EVIDENCE DISPUTING PLAINTIFF'S RIGHT TO A VERDICT?

1. The documentary "See You In Court" was prejudicial. On July 9, 1980, at 10:00 P.M., CBS broadcast the documentary "See You In Court." The program made the following observations contrary to law:

A) The introduction criticized people for suing;

B) The program prominently featured a country and western song with the lyrics '...lawyers are leeches...";

C) The program blamed the litigation expolsion on the number of students graduating from law school making "...more hungry lawyers looking for business;

D) The program claimed that lawyers see to it that there are more laws and more lawsuits;

E) The program portrayed defendants as being "...caught up in a maze of lawyers...";

F) The central thesis of the program was that the cost of litigation is borne by the American people who lose when the jury returns a verdict for the plaintiff;

G) The program specifically criticized the case of U.S. v. IBM calling it an 11 year ordeal whose major accomplishment was to provide for a very comfortable living for hundreds of lawyers;

H) The program returned to the country and western song with the lyrics '...lawyers are takers; they are pocketbook breakers...";

I) The program again criticized a jury verdict against the Town of Cashion which had to borrow money from a bank to pay off a jury verdict because the town did not have liability insurance;

J) The program then criticized a million dollar verdict against the City of Beverly Hills, and indicated that this induces claims against the municipality as a "...deep pocket..." at a rate of one claim a day;

K) The program prominently featured the claim that if a person is placed in an unfortunate situation of being injured by someone, then you should bear the responsibility of your injury yourself rather than seeking compensation from the tortfeasor;

L) The program claimed that taxes go up because municipal corporations must pay higher and higher insurance premiums;

M) The program also criticized the usage of contingency fees by lawyers for the plaintiff and labelled the private lawyer as a hired gun for the plaintiff;

N) The program advised that even if a Defendant is innocent, the costs of the litigation can bankrupt him;

O) The program concluded on the note that even if a private citizen never finds himself in court, the existence of litigation--and verdicts in favor of plaintiffs--will adversely affect all of our lives.

On the next day, the jury commenced their deliberations, and found in favor of Defendant. Plaintiff cannot demonstrate actual prejudice by one or more of the jurors who actually saw the program. Needless to say, if the defense lawyer had made these same observations in his closing argument to the jury, a mistrial would have been

granted. The legal question involves whether or not the Plaintiff must prove "actual prejudice" in order to get a new trial.

2. Actual prejudice to the jury is not required. Although a claim of a Due Process violation is buttressed by a showing of identifiable prejudice, there are certain instances which involve such a high probability of prejudice that they are deemed inherently prejudicial. See, Sheppard v. Maxwell 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Turner v. Louisiana 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); Rideau v. Louisiana 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963).

This rule has also been enunciated in Brasville v. United States 200

F.2d 597, 602 (5th Cir, 1952):

> "And where error occurs which, within the range of reasonable possibility may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict."

Again, Judge Kaufman wrote in Bulger v. McClay 575 F.2d 407 (2nd Cir, 1978), cert. denied ____U.S.____, ____L.Ed.2d ____, 99 S.Ct. 290 (1979), as follows:

> "The jury, of course, is not a sterile institution in our judicial structure. It would be naive to suggest that individual jurors leave all their preconceptions, values and insights on the doorstep when they enter a jury room. Indeed, we encourage jurors to bring their experiences to bear during deliberation. The line between this permissible activity and the consideration of improper evidence is seldom clear. Yet, where specific facts enter the crucible of decision without appropriate

> safeguards, the constitutional role of the jury is undermined, and the defendant is denied the fair trial which is his constitutional due."

See, also, United States v. Vasquez 597 F.2d 192 (9th Cir, 1979); United States v. Pittman 444 F.2d 1284, 1286 (9th Cir, 1971). See, also, McKibbin v. Philadelphia RR Co. 251 Fed 577 (3rd Cir, 1918), and Moorse v. Montana Ore-Purchasing 105 Fed 337 (8th Cir, 1900), where the existence of prejudicial newspaper articles to which the jury had access was the denial of a fair trial to civil litigants.

3. Actual prejudice to Plaintiff in an undisputed liability case is inferred by the result. Although Plaintiff is not required to prove actual prejudice, the inference of actual

prejudice is clear. Even the defense counsel conceded that there was no evidence disputing liability:

> "THE COURT: Mr. Santee, did you present any evidence to contest liability?
> MR. SANTEE: No, there was none."

(N.T., II, 216)

The fact that the Defendant could prevail on a case where it candidly admitted to the trial court that it presented no evidence disputing liability leaves one inescapable conclusion: the jury saw the prejudicial news broadcast, "See You In Court" and decided that the Plaintiff should bear the responsibility of the injury herself rather than seeking compensation from the tortfeasor.

3. The right of free speech of CBS to advocate the elimination of the law of torts cannot be used as a justifica- to deny Plaintiff her right to a fair

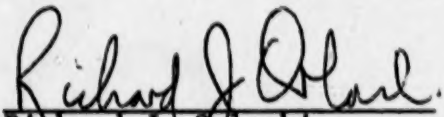
trial. In the instant case, the CBS documentary was, in reality, a piece of advocacy journalism which criticized persons for seeking compensation from the tortfeasor merely because the person was wrongfully injured. Instead, it argued for the victim to bear his own injuries rather than inflict upon the tortfeasor the burdens of litigation and judgment. Furthermore, it appealed to the prejudices of the jury by arguing that, when the tortfeasor pays compensation, all of us--even the jury--pay in the form of higher insurance rates. This broadcast seen on prime time in the viewing area of the jurors when jurors would be most apt to watch the broadcast because of their own involvement in the judicial process is so inherently prejudicial

that Plaintiff need not prove actual prejudice. Accordingly, on this basis alone, a new trial must be granted.

(j) CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari must be granted.

STAMBERG, CAPLAN & CALNAN



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APPENDIX

ALICE LeMASTER,

Appellant

v.

JAMES R. McGONIGLE,

Appellee

Appeal from the United States District Court for the Eastern District of Pennsylvania

C.A. No. 79-2855

Before: ADAMS, ROSENN and HUNTER,

Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the Judgment of the district court be and is hereby affirmed.

Each side to bear its own costs.

DATED:
Mar. 5, 1981

BY THE COURT:

/S/ Arlin M. Adams

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALICE LeMASTER	:	CIVIL ACTION
v	:	
JAMES R. McGONIGLE	:	NO. 79-2855

FILED: AUG. 29,1980

MEMORANDUM AND ORDER

HUYETT, J. August 29, 1980

Following a jury verdict in favor of defendant, plaintiff has moved for a judgment notwithstanding the verdict as to liability or for a new trial. In determining whether there was evidence upon which the jury could have properly found a verdict in favor of defendant, we are required to view the evidence in the light most favorable to defendant and to give him the benefit of all reasonable inferences therefrom. 9 Wright & Miller, Federal Practice & Procedure §2524 (1971). The burden of proof in this negligence

action was upon the plaintiff. The occurrence of a rear-end collision does not constitute negligence as a matter of law under the law of Pennsylvania, which applied to this action. Cirquitella v. Callaghan, Inc. 331 Pa. 465 (1938). Although we might well have reached a different conclusion than that reached by the jury had we been the finder of fact, drawing all reasonable inferences in favor of defendant, we cannot say that the jury could not permissibly have concluded that Plaintiff had failed to meet her burden.[1]

---

[1]Although several questions were submitted to the jury under the charge, both parties agree that the jury's verdict was based upon its determination of the question of negligence.

ENTERED: 9/20/80

Plaintiff's motion for judgment notwithstanding the verdict will be denied.

The issues in this trial were simple, and the trial itself was relatively brief. Based upon the record as a whole, we do not believe that this case merits our granting a new trial on the grounds that the verdict was against the weight of the evidence. As an additional ground in support of her motion for a new trial, plaintiff contends that a television broadcast the evening before the case was submitted to the jury deprived her of a fair and impartial jury. Plaintiff's contention is, however, speculative at best. Plaintiff has submitted no affidavit from any juror to the effect that the broadcast was viewed by any juror or that "extraneous prejudicial information was

improperly brought to the jury's attention." Fed.R.Evid. 606(b). Nor has plaintiff requested that the jury be reconvened to inquire into this matter. Since the broadcast upon which plaintiff relies is not alleged to have concerned the facts of this particular case, as opposed to the evils of litigation in general, we decline to order such an inquiry upon our own motion. Based upon the record produced, we will not presume that the jurors decided this case in contravention of their oaths and in disregard of the charge.

/S/ Daniel H. Huyett III
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALICE LeMASTER	:	
	:	CIVIL ACTION
v.	:	
	:	No. 79-2855
JAMES R. McGONIGLE	:	

O R D E R

NOW, August 29, 1980, upon consideration of plaintiff's motion for judgment notwithstanding the verdict or for a new trial, the memoranda and affidavits submitted by the parties, and for the reasons stated in the accompanying memorandum, IT IS ORDERED that the motion is DENIED.

/S/ Daniel H. Huyett, III
Daniel H. Huyett, 3rd,
Judge